

## **MINUTES**

### **MONTANA HOUSE OF REPRESENTATIVES 58th LEGISLATURE - REGULAR SESSION**

#### **COMMITTEE ON JUDICIARY**

**Call to Order:** By **CHAIRMAN JIM SHOCKLEY**, on January 24, 2003 at 8 A.M., in Room 137 Capitol.

#### **ROLL CALL**

**Members Present:**

Rep. Jim Shockley, Chairman (R)  
Rep. Paul Clark, Vice Chairman (D)  
Rep. Jeff Laszloffy, Vice Chairman (R)  
Rep. George Everett (R)  
Rep. Tom Facey (D)  
Rep. Steven Gallus (D)  
Rep. Gail Gutsche (D)  
Rep. Christopher Harris (D)  
Rep. Michael Lange (R)  
Rep. Bruce Malcolm (R)  
Rep. Brad Newman (D)  
Rep. Mark Noennig (R)  
Rep. John Parker (D)  
Rep. Holly Raser (D)  
Rep. Diane Rice (R)  
Rep. Ron Stoker (R)  
Rep. Bill Thomas (R)

**Members Excused:** Rep. Scott Sales (R)

**Members Absent:** None.

**Staff Present:** John MacMaster, Legislative Branch  
Lisa Swanson, Committee Secretary

**Please Note:**

**Audio-only Committees:** These are summary minutes. Testimony and discussion are paraphrased and condensed.

**Committee Business Summary:**

Hearing & Date Posted: HB 289, 1/20/2003; 293, 1/20/2003;  
308, 1/20/2003; 316, 1/20/2003;  
327, 1/20/2003  
Executive Action: None

**HEARING ON HB 327**

**Sponsor:** REP. CHRISTOPHER HARRIS, HD 30, Bozeman

**Opening Statement by Sponsor:**

**REP. HARRIS** opened on HB 327. He stated that this bill would provide that, except in certain cases, the public has a right to know the contents of documents in a civil action, including the contents of a settlement agreement. He stated the Fourth Circuit Court of Appeals, which is notoriously the most conservative court, held documents of the sort this bill addresses should not be kept confidential. He explained that the court reasoned that because a lot of documents concerning product liability cases were kept confidential, many people were harmed by faulty products.

***{Tape: 1; Side: A; Approx. Time Counter: 1 - 58}***

**Proponents' Testimony:**

**Al Smith, Montana Trial Lawyer's Association (MTLA)**, supported HB 327. He stated that this bill is very important for public safety especially concerning defective products which cause harm to consumers. He said that this bill will codify existing law as Montanans have a right to know under the Montana Constitution. He emphasized the problem is that a person has to litigate to get the information. He stated the bill will address the bottom line which is to protect the public.

***{Tape: 1; Side: A; Approx. Time Counter: 59 - 153}***

**SENATOR MICHAEL WHEAT, SD 14, Bozeman, MTLA**, supported HB 327. He stated this bill clearly states the public's right to know. He emphasized that in litigation involving public hazard issues, the information should be available to the public unless there is a compelling reason to keep it secret. He stated that defendants often leverage the plaintiffs in settlement agreements if the plaintiff agrees to confidentiality of all documentation which has been discovered. This would take the leverage out of the defendant's hands and place it properly in the judge's hands. He urged the Committee to give serious consideration for a do pass.

***{Tape: 1; Side: A; Approx. Time Counter: 154 - 194}***

**Richard Barber**, supported HB 327. He stated his family has been affected by a defective product. He has not been able to get documents involved in the death of his nine-year-old son. He

spoke of pharmaceutical companies deluding people and feels it is wrong that these companies can clear out the courtroom. He stated the companies should not be allowed to get gag orders issued when exposing problems would save lives.

**Opponents' Testimony:** None

**Informational Testimony:**

**Russ Cater, Chief Legal Counsel, Department of Public Health and Human Services (DPHHS),** spoke about persons committed to institutions. He stated that courts have recognized committed persons as having a right to privacy. He stated his office also processes termination of parental rights proceedings. He felt that an amendment on the individual's right to privacy would make the bill acceptable.

***{Tape: 1; Side: A; Approx. Time Counter: 195 - 347}***

**Anita Roessman, Attorney, Montana Advocacy Program,** reiterated Mr. Cater's points to ensure that people who are committed to institutions have their rights protected. She agreed the bill needs amending.

**Beda Lovitt, Montana Psychiatric Association,** stated her concern with the rights of the developmentally disabled persons.

***{Tape: 1; Side: A; Approx. Time Counter: 348 - 355}***

**Questions from Committee Members and Responses:**

**REP. NOENNIG** asked Al Smith about settlement agreements in non-products liability cases. He stated that a settlement agreement can prevent people from disclosing information whether or not this bill passes. He asked about Line 16, Page 1 which stated, ". . . a document in a civil action, including a document setting forth a settlement, is a public document and is open to the public for inspection." **REP. NOENNIG** stated many documents in attorney files should not be open to the public. **REP. HARRIS** responded that a bright line could be created so that deposition transcripts or documents related to them, whether or not filed, are discoverable whereas an attorney's private files could be precluded. **REP. NOENNIG** asked about the contract case involving the price of widgets and why that should be open to the public.

***{Tape: 1; Side: B; Approx. Time Counter: 1 - 8}***

**REP. MALCOLM** followed up **REP. NOENNIG's** line of questioning regarding what is and is not discoverable. He suggested the bill

be amended to list things that are important to the public and which would be discoverable; things not included in the bill would not be open to the public. **REP. HARRIS** stated that would be a different approach, however he looked at the Constitutional Right to Know as a starting point. He stated that court documents are public documents and when people go to court to resolve their differences, the settlement documents and deposition transcripts should be public.

**{Tape: 1; Side: B; Approx. Time Counter: 19 - 32}**

**REP. RICE** asked Al Smith about the McDonald's coffee case and whether this public knowledge would be very damaging as far as encouraging frivolous litigation. **Mr. Smith** responded, "No." He stated the McDonald's case involved over 700 reports of their coffee being too hot, that the coffee was 40-50 degrees hotter than any other coffee in the industry, and that the injured woman offered to settle for \$20,000 in medical damages but McDonald's refused. He stated the jury listened to all the facts, all of McDonald's executives, and punished McDonald's by awarding punitive damages worth coffee profits for one day. That verdict was reduced by the appellate court. He stated litigation decreases when companies with a legitimate defense, fight settlement tooth and nail.

**{Tape: 1; Side: B; Approx. Time Counter: 33 - 73}**

**REP. FACEY** asked if this is a public safety concern, should not the suits become class action. **Mr. Smith** responded that to file a class action, you have to certify the class composed of a large number of people, similarly situated and affected. A large number of people could entail thousands. He stated in Montana, it would be difficult to find thousands of affected people and thus difficult to move forward. The phen-phen drug litigation affected thousands of people across the country and that was an appropriate class action. He stated the usual situation in Montana involves a single plaintiff.

**{Tape: 1; Side: B; Approx. Time Counter: 74 - 103}**

**REP. RASER** asked whether open disclosure would lower the number of class action lawsuits. **Mr. Smith** responded it may lower the number of individual suits. He explained that if the discovery was open to the public, the companies may change harmful products or behaviors before thousands of lives are harmed.

**{Tape: 1; Side: B; Approx. Time Counter: 104 - 115}**

**CHAIRMAN SHOCKLEY** stated the thrust of HB 327 is products liability. He commented that if a corporation was without sin, then what would they have to hide. **SENATOR WHEAT** responded that if defendants have nothing to hide, then they can open up to everybody. He stated that critical information is discoverable information which attorneys use for trial. He explained that HB 327 would address the situation where a settlement agreement is reached and the defendant forces the plaintiff to agree to a non-disclosure agreement. **CHAIRMAN SHOCKLEY** stated almost all discovery is not filed and he read the bill to only cover documents which are filed by the court. He asked if the bill could be limited to public disclosure of depositions or discovery, filed or unfiled. **SENATOR WHEAT** responded that any document which is capable of being filed would be more appropriate but emphasized that may even be too broad. He suggested a change that states a defendant cannot force a plaintiff in a settlement agreement to not disclose discovery. He stated there must be some protection for the public when it involves public health and safety.

*{Tape: 1; Side: B; Approx. Time Counter: 116 - 204}*

**REP. CLARK** asked Mr. Smith whether the bill could be clarified to ensure that matters of public health and safety are the issue and not private files. **Mr. Smith** responded that is the intent of the bill and amending lines 24-26, to reflect that idea would be a good idea.

*{Tape: 1; Side: B; Approx. Time Counter: 205 - 234}*

**REP. STOKER** asked whether public disclosure could also include the stock market. **Mr. Smith** responded that could be included in the bill. He explained that the insurance and securities laws cover that somewhat but that perhaps HB 327 should be strengthened in that area as well.

*{Tape: 1; Side: B; Approx. Time Counter: 235 - 252}*

**Closing by Sponsor:**

**REP. HARRIS** closed on HB 327. He explained that the Judicial Branch belongs to the people and should be available to all people. He explained that bright lines could be created to recognize issues of privacy, but which protect the main issue that there ought to be sunshine in litigation.

*{Tape: 1; Side: B; Approx. Time Counter: 253 - 266}*

**HEARING ON HB 308**

**Sponsor:** REP. JOHN MUSGROVE, HD 91, Havre and Chinook

**Opening Statement by Sponsor:**

**REP. MUSGROVE** opened on HB 308. He stated that this bill clarifies that sexual or violent offenders pay the costs to register with law enforcement agencies and pay, if able, for costs to notify or disseminate information to a victim or group. He explained that the money would be deposited in the general fund. He offered that 50 percent of offenders would be able to pay.

*{Tape: 1; Side: B; Approx. Time Counter: 267 - 302}*

**Proponents' Testimony:**

**Jim Smith, Montana Sheriff's and Peace Officer's Association**, supported HB 308. He stated these offenders should pay and be accountable.

**Opponents' Testimony:**

**Scott Crichton, American Civil Liberties Union (ACLU)**, supported HB 308. He stated that if folks had work when they were released from prison, then the recidivism rate would be much less. He asked at what point does the sex offender sentence end. He explained that for offenders are punished for life. He cited Megans law and emphasized that every session brings an additional element and burden to their sentence. He stated there are different degrees of offenders and each person is an individual with different circumstances surrounding the offense. He stated these people are being punished for the rest of their lives and this would be just one more burden. He explained that sex offenders are an easy target as nobody wants to stand up on their behalf. He closed stating that enough is enough.

*{Tape: 1; Side: B; Approx. Time Counter: 303 - 430}*

**Informational Testimony:** None

**Questions from Committee Members and Responses:**

**REP. FACEY** asked if the bill could be amended so that funds, which the defendant's incurred while incarcerated, could go to HB 308 expenses. **REP. MUSGROVE** stated that was not necessary. **REP. GUTSCHE** asked **REP. MUSGROVE** what the fee would be and how to determine whether the person could pay. **REP. MUSGROVE** stated the

fee is \$50 and the agency involved would find out their financial circumstances.

***{Tape: 1; Side: B; Approx. Time Counter: 431 - 504}***

**REP. RICE** asked Mr. Crichton whether he had any statistics regarding offenders who have been found not guilty by post conviction DNA testing. **Mr. Crichton** responded he does not, but would try to get some information.

***{Tape: 2; Side: A; Approx. Time Counter: 1 - 16}***

**Closing by Sponsor:**

**REP. MUSGROVE** closed on HB 308, stating that this bill is to ensure that there is payment rendered for victim and public notification.

***{Tape: 2; Side: A; Approx. Time Counter: 17 - 33}***

**HEARING ON HB 316**

**Sponsor:** **REP. JIM SHOCKLEY, HD 61, Victor**

**Opening Statement by Sponsor:**

**REP. SHOCKLEY** opened on HB 316, stating this is a clean up bill. He stressed that Montana's prisons are overflowing and that prisons and jails are housing inmates beyond maximum capacity. He stated you have a choice to spend money on education or prisons; build roads or keep people in prison. He explained that this bill would help effectuate a compromise. He cited 53-30-106 as allowing the warden, under certain circumstances, to control the population by stopping the input. He stated that this bill would amend that statute.

**CHAIRMAN SHOCKLEY** stated a bit of history on HB 316. In the last special session, the Department of Corrections (DOC) requested a bill to provide for a mechanism to modify the way inmates are released early. **CHAIRMAN SHOCKLEY** stated the bill hit some snags, one of which involved DOC not reimbursing the counties for DOC prisoners they housed. **CHAIRMAN SHOCKLEY** explained this is a new and better bill, and that under the present budget, the prison population needs to be reduced.

He explained that the way to reduce the population is not to stop the input, but to make a mechanism where DOC can release inmates early near the end of their sentence. He referred to this mechanism as a "pressure relief valve." He explained that

presently, DOC just stops the input until the population drops below 95 percent emergency capacity. This bill would allow inmates to continue to come in from the jails, and allow the DOC to release inmates, who are not sex offenders or convicted of violent crimes, out 90 days early.

***{Tape: 1; Side: A; Approx. Time Counter: 42 - 142}***

**Proponents' Testimony:** None

**Opponents' Testimony:** None

**Informational Testimony:**

**Jim Smith, Montana Sheriff's and Peace Officers Association,** stated this is a much-improved bill, and if the Governor approves it, his organization would be more supportive. He stated in the August, 2002, special session, the County Attorney's Association stressed the costs of conviction and that perhaps early release came to fast. He thanked REP. SHOCKLEY for a much-improved bill. He agreed that the Governor ought to be in the loop. He stated that he would like to be included with defining "emergency capacity" and helping with victim notification.

***{Tape: 2; Side: A; Approx. Time Counter: 147 - 183}***

**Questions from Committee Members and Responses:**

**REP. NOENNIG** asked to question Director Bill Slaughter even though he didn't testify. **CHAIRMAN LASZLOFFY** stated that would be fine. **REP. NOENNIG** asked Mr. Slaughter whether he was familiar with HB 316 and whether DOC is supportive. **Mr. Slaughter** stated he was familiar with the bill, but DOC chose to remain neutral on HB 316. **REP. NOENNIG** stated that at the August, 2002 special session, the DOC presented this bill on the basis the DOC would never need it. He stated that they did indeed need it to balance the budget. He stated that now the fiscal note is \$1.3 million to implement HB 316.

***{Tape: 2; Side: A; Approx. Time Counter: 186 - 213}***

**REP. SLAUGHTER** responded that during the last special session, a lot of things were in flux and they did not have the advisory counsel's consensus on dealing with DOC commitments. He stated that as of today, DOC has released 449 inmates early and the rate of recidivism is seven percent which is way less than the average rate of 36 percent. He emphasized that the early release is an unqualified success and that DOC has learned a lot of things since the last special session. He felt there were some gaps



with victim notification and how DOC guarantees public safety. He felt he learned a lot at the hearing today. He stressed DOC chose to remain on the sidelines of HB 316, as neither an opponent or proponent, and that DOC learned a lot from this day's testimony.

***{Tape: 2; Side: A; Approx. Time Counter: 214 - 248}***

**REP. NOENNIG** asked Mr. Slaughter whether he had the same public safety concerns and implementation problems with HB 316. **Mr. Slaughter** responded he had the most concern over implementation. He stressed the other issue concerns victims and explaining to them how this mechanism works. **REP. NOENNIG** asked about the financial objectives and whether they are realistic. **Mr. Slaughter** responded, "It really depends on what HB 316 can do for the DOC." He believed that with the Governor's budget, DOC can put programs back in secured care facilities, which DOC took out, and meet the growth in the system by 4-5 percent. **Mr. Slaughter** stated that **REP. SHOCKLEY'S** bill has a gate affect. He explained that if prison populations get to a certain level, DOC would have more flexibility in releasing and accepting prisoners.

***{Tape: 2; Side: A; Approx. Time Counter: 248 - 283}***

**REP. GUTSCHE** explained to the Committee that **REP. SHOCKLEY** was the sponsor, opponent and proponent of his own bill last special session. She asked him to explain how this bill differs. **REP. SHOCKLEY** stated he did not have a copy of the old bill. He recalled that the old bill did not have a provision stating that sexual or violent offenders would not qualify for early release.

***{Tape: 2; Side: A; Approx. Time Counter: 284 - 314}***

**Warden Mahoney** added that there were two other bills at the special session. He stated that they attempted to reach a compromise but it was complex as to who would be impacted. He emphasized that you cannot put a price on public safety.

***{Tape: 2; Side: A; Approx. Time Counter: 315 - 377}***

**REP. GUTSCHE** stated this is a public policy issue. She asked what a good alternative to this bill would be. She suggested placing more emphasis on local supervision.

***{Tape: 2; Side: A; Approx. Time Counter: 378 - 402}***

**REP. SHOCKLEY** stated that one of the purposes of this bill is to have the legislature more involved in letting people out. He

believed that Warden Mahoney and DOC staff are genuinely concerned with releasing someone who may pose a danger to the public. He stated the present statute puts the burden on the counties, and this bill would remove that burden.

***{Tape: 2; Side: A; Approx. Time Counter: 403 - 488}***

**REP. GALLUS** asked Warden Mahoney about the design capacity.

**Warden Mahoney** stated the design capacity is 862 and the average daily population is 1,305. He stated he does not like running the institution when it is beyond 1,000 inmates. **REP. GALLUS** asked whether there is a clear definition for emergency capacity. **Warden Mahoney** responded there is not a clear definition and that he would be willing to work on one. **REP. GALLUS** asked who or what is at risk when emergency capacity is exceeded. **Warden Mahoney** stated that the inmates get pushed backed up to the county jails which then becomes a public problem. He explained that law enforcement has difficulty executing warrants issued and enforcing laws at the community level due to a lack of resources. **Warden Mahoney** stated that when the prison is overcrowded, it creates a potential powder keg within the prison. He cited prison overcrowding compromising the safe and orderly operation of the prison.

***{Tape: 2; Side: B; Approx. Time Counter: 1 - 33}***

**REP. NEWMAN** asked Mr. Slaughter whether he could give any compelling reason to pass HB 316. **Mr. Slaughter** responded that if HB 316 is passed, he had no idea what the budget would look like. He stated that as of today, DOC had more beds in the system than money to pay for them. He stated the DOC is short on funds to pay for contract beds. **REP. NEWMAN** asked Mr. Slaughter whether they should give DOC the authority to release inmates early, when DOC has not requested it. **Mr. Slaughter** stated that things have changed since the August, 2002 special session. He advised that the Conditional Release program will be phased out in February, 2003. Mr. Slaughter, finally, responded to REP. NEWMAN'S question stating that there is no compelling reason to implement HB 316.

***{Tape: 2; Side: B; Approx. Time Counter: 65 - 83}***

**REP. CLARK** asked Warden Mahoney about DOC policies for early or conditional releases. **Warden Mahoney** responded DOC has a written policy. He stated DOC released over 300 offenders on conditional release with a seven percent recidivism rate. However, he went on to explain that as of February 1, 2003, DOC will not screen any inmates for conditional release, but will consider previously screened cases. **REP. CLARK** asked Mr. Slaughter about

the Governor's budget. He wondered if it were tightened, whether that would lighten the DOC's burden. **Mr. Slaughter** responded that the DOC is tracking 14 bills that would make 34 new felons every month, if passed. He emphasized the detrimental affect this would have on DOC's budget. He explained that the Governor's budget of \$31 million only puts the counseling programs back in secure facilities and accounts for the projected growth.

**{Tape: 2; Side: B; Approx. Time Counter: 84 - 210}**

**REP. RICE** asked about the underlying reasons for revoking the seven percent. **Warden Mahoney** responded that two people were revoked for new crimes and the others were revoked for violating their conditions.

**{Tape: 2; Side: B; Approx. Time Counter: 214 - 226}**

**Closing by Sponsor:**

**REP. SHOCKLEY** closed on HB 316. He quoted from Cool Hand Luke stating, "What we have here is a failure to communicate." He reiterated that they had a meeting in March where the DOC asked the Committee to find a way to reduce the prison population due to a lack of money. The DOC's original idea was to go to good time and double it which both he and the judges thought was a bad idea. He stated that in July, 2002, the DOC asked him to draft a bill addressing the issue. He explained that the DOC submitted another bill, in the special session, with provisions he was not consulted on. He stated his bill got massacred.

**REP. SHOCKLEY** explained that HB 316 is less restrictive than the bill DOC drafted last August, 2002. He stated if the DOC used HB 316, it would be more restrictive, thus satisfying some of the concerns of law enforcement. He explained the bill would take the burden off of the counties. He emphasized that a seven percent recidivism rate is very good, but that it would likely go up.

**{Tape: 2; Side: B; Approx. Time Counter: 227 - 282}**

**HEARING ON HB 293**

**Sponsor:** **REP. FRANK SMITH, HD 98, Poplar**

**Opening Statement by Sponsor:**

**REP. SMITH** opened on HB 293 stating it would prohibit racial profiling. He explained that the bill would require law enforcement to adopt a detailed written policy, which would clearly define the elements of racial profiling, and that would prohibit it. The policy would have a procedure to investigate complaints of racial profiling, and require law enforcement to take action if an officer should violate the policy.

***{Tape: 2; Side: B; Approx. Time Counter: 283 - 315}***

**Proponents' Testimony:**

**Pam Bussey, Assistant Attorney General, Department of Justice (DOJ)**, supported HB 292. **Ms. Bussey** stated the bill is modeled after Colorado and Oklahoma legislation.

***{Tape: 2; Side: B; Approx. Time Counter: 316 -468}***

**Shawn Driscoll, Colonel of Highway Patrol**, supported HB 293. He explained the patrol does all it can to encourage public trust. He stated this is a statewide, and not a reservation issue. He emphasized that Montana has seven major reservations. He stated that officers have cameras in their cars and everything is documented in order to hold officers accountable. He explained that they made a change on their notices to appear.

**EXHIBIT (juh15a01)**

***{Tape: 3; Side: A; Approx. Time Counter: 1 - 52}***

**REP. CAROL JUNEAU, HD 85, Glacier**, supported HB 293. She stated she lives in Browning on the Blackfoot Reservation. She stressed the disproportionate number of Native Americans incarcerated in Montana's prisons. She stated that Native Americans incarcerated in Deerlodge were not arrested on the Reservation. She asked a rhetorical question concerning the large number of Native Americans in Deerlodge. She explained why racial profiling is important for Montana.

***{Tape: 3; Side: A; Approx. Time Counter: 53 - 89}***

**Troy McGee, Chiefs of Police, Helena**, supported HB 293. He stated that racial profiling is illegal and will not be condoned. He also emphasized the importance of education and documentation.

***{Tape: 3; Side: A; Approx. Time Counter: 90 - 109}***

**REP. NORMA BIXBY, HD 5, Lame Deer**, supported HB 293, stating she felt that she has been a victim of racial profiling. She

explained this was partially due to her number 22 license plates from Big Horn County. She told of some young teens from Fort Peck who were lost in Billings when stopped by police. She stated the officers turned off their cameras, then harassed the kids. She wrote a complaint to the Billings Police Department, which looked into it, but did not find any wrong doing. She gave other examples of Native Americans being denied service at restaurants in Billings.

***{Tape: 3; Side: A; Approx. Time Counter: 150 - 163}***

**Jim Smith, Montana Sheriffs and Peace Officers Association,** supported HB 292, stating racial profiling will not be tolerated in Montana. He emphasized that officer education and training is paramount. He stated the Law Enforcement Academy (Academy) has added a class on racial profiling.

***{Tape: 3; Side: A; Approx. Time Counter: 164 - 182}***

**REP. JOEY JAYNE, HD 73, Arlee,** supported HB 293 stating this is a fairness policy. She stated when she moved to Montana, the word around town was that if you had number 15 licence plate, had dream catchers in your car, or you drove an old Ford Fairline, you stood a good chance of being stopped. She stated racial profiling has occurred and she supported the bill.

***{Tape: 3; Side: A; Approx. Time Counter: 183 - 210}***

**Beth Brenneman, Legal Director, American Civil Liberties Union (ACLU),** supported HB 293. She stated the ACLU is very concerned with racial discrimination, both nationally and in Montana. She stated that the majority of racial profiling cases are filed by the ACLU. She felt the bill is overly broad and leaves it open to law enforcement to determine whether and what types of offenses occurred. She stated their needs to be a recording mechanism to document any type of potential racial profiling in order to observe trends. She also had a problem with the word "solely" and asked it be changed to "significantly."

***{Tape: 3; Side: A; Approx. Time Counter: 211 - 296}***

**Jim Kembell, Montana Police Protective Association,** supported HB 293.

**REP. VERONICA SMALL-EASTMAN, HD 6, Big Horn and Yellowstone County and Crow Reservation,** supported HB 293. She commented that Native Americans face profiling issues everyday and they are somewhat conditioned to it. She emphasized that data should be collected to develop a filtering system.

***{Tape: 3; Side: A; Approx. Time Counter: 298 - 344}***

**Opponents' Testimony:** None

**Informational Testimony:** None

**Questions from Committee Members and Responses:**

The Committee asked Colonel Driscoll how long the tapes are kept, about changing the word solely to significantly, and whether officers may stop people based on race. **Colonel Driscoll** stated the officer may not stop people based on race. He emphasized that officers must have a legitimate reason to stop someone. He stated the officer, prior to the stop and on the camera, must articulate what they saw, what the violation was, and the reason for the stop. He emphasized that the training guidelines teach that once cameras are activated, they are not to be stopped. He stated that the camera may be stopped if the officer is out for a long time, but they must explain the reason for deactivating the camera prior to turning the camera off. They keep the tapes for 180 days unless there is a complaint, in which case they permanently maintain the tape. He explained the officers want everything recorded for their protection.

***{Tape: 3; Side: A; Approx. Time Counter: 344 - 438}***

**Colonel Driscoll** stated he although he is not aware of any officers engaging in racial profiling, he is not so naive as to think it has never occurred.

**REP. RICE** asked whether rural areas which have few or no Native Americans would be exempt from this bill. **Mr. Smith** stated no.

***{Tape: 3; Side: A; Approx. Time Counter: 439 - 515}***

**REP. NOENNIG** asked whether law enforcement support would be withdrawn if the definition of racial profiling were withdrawn. **Ms. Bussey** responded that law enforcement agreed on the definition, that a lot of time was spent negotiating the definition, which is now in the bill. She explained that courts require the prosecution to prove the officers engaged in a pattern and practice of racial profiling.

***{Tape: 3; Side: B; Approx. Time Counter: 1 - 90}***

**Closing by Sponsor:**

**REP. SMITH** closed on HB 293 and stated he would appreciate a do pass.

**HEARING ON HB 289**

**Sponsor:** REP. BRAD NEWMAN, HD 38, Butte

**Opening Statement by Sponsor:**

REP. NEWMAN opened on HB 289. He explained that this bill would make it a crime for a driver to refuse a blood or breath test, impose a charge in addition to the fine, and increase the license reinstatement fee for a driver who refuses. He stated this bill is not tied to any federal funding. He stated drunk drivers slip through the side door by refusing a blood or breath test. He explained that this bill would criminalize the refusal. The first and second refusals would be misdemeanors, and the third, a felony. He felt this would be a most effective tool to getting motorists to provide samples. He also explained that these samples would exonerate as well as assist in convicting motorists.

***{Tape: 4; Side: A; Approx. Time Counter: 212 - 299}***

**Proponents' Testimony:**

Al Recke, Coordinator of Cascade County DUI Task Force, supported HB 289. He stated a refusal is much more common than cooperating. He cited that approximately 50 percent of the people stopped in Cascade County refused to blow. He strongly urged a do pass.

**EXHIBIT(juh15a02)**

***{Tape: 4; Side: A; Approx. Time Counter: 300 - 359}***

Bill Muhs, President of Mothers Against Drunk Driving (MADD), Bozeman, supported HB 289. He posed that people refuse to blow because it will keep them from getting a DUI conviction. He explained that in order to change this, the penalty for a refusal to submit to a BAC must be higher than a DUI conviction. He asked the license revocation be for one year with no chance of a probationary license.

**EXHIBIT(juh15a03)**

***{Tape: 4; Side: A; Approx. Time Counter: 360 - 428}***

**Bill Robinson, Emergency Medical Physician, Bozeman**, supported HB 289. He stated this bill is essential to strengthen DUI laws. He asked for stiffer penalties for refusing to submit to a BAC. He emphasized that if DUI laws become stricter and this bill does not pass, then the refusal rate will drastically increase.

**EXHIBIT(juh15a04)**

**{Tape: 4; Side: A; Approx. Time Counter: 429 - 515}**

**Dennis Paxinos, Yellowstone County Attorney**, supported HB 289. He urged that this bill would take away a drunk driver's refusal to submit to a BAC. He emphasized that removing their license does not deter drunk driving. He stated that making refusal to blow a crime would help deter drunk driving. He cited State v. Gilmore where a defendant was just out of jail on his most recent driving offense when involved in a high speed chase with law enforcement. As an aside, Mr. Paxinos subtly shamed the Committee for tabling the high speed pursuit bill.

**{Tape: 4; Side: A; Approx. Time Counter: 1 - 72}**

**CHAIRMAN SHOCKLEY** asked whether the speeder was charged with criminal endangerment, a felony. **Mr. Paxinos** stated the driver was charged with criminal endangerment but that the Supreme Court is heading for a void for vagueness.

**{Tape: 4; Side: A; Approx. Time Counter: 73 - 78}**

**Pam Bussey, Assistant Attorney General**, supported HB 289. She suggested the Committee talk with the Motor Vehicle Division as there was a problem with the fiscal note in that it undercut the refusal rate by two times. She stated Brenda Nordlund would draft a written explanation of the fiscal note.

**{Tape: 4; Side: A; Approx. Time Counter: 79 - 97}**

**Opponents' Testimony:**

**Beth Brenneman, ACLU, Civil Rights Litigation Department**, opposed HB 289. She worried about the potential of abuse and substantial litigation. She worried about the invasive nature of the bill. She stated that this bill would adversely affect people who cannot afford an attorney. She stated that the bill would allow an officer to, in circumstances, conduct bodily invasive tests.

**{Tape: 4; Side: A; Approx. Time Counter: 98 - 121}**



**REP. JOEY JAYNE, HD 73**, opposed HB 289. She stated she would not speak on sections 4-8 of the bill as **REP. NEWMAN** stated this would be omitted. She spoke on the remainder of the bill stating she is a defense attorney. She stated the burden of proof is on the State and that the process is already in place for the county attorneys. She denied that defendant's are slipping out the side door, as the prosecution has a lot of other evidence to prosecute. She emphasized that a BAC alone cannot convict a person and that much more is required to convict. Regarding a blood test, she asked the Committee to consider how blood would be drawn for victims in crashes.

**{Tape: 4; Side: A; Approx. Time Counter: 122 - 187}**

**Wendy Holton, Attorney**, opposed HB 289. **Ms. Holton** stated this bill could be subject to constitutional challenge. She explained that having both a State sponsored criminal and civil penalty, which are meant to be clearly punitive, violates the double jeopardy clause of the State Constitution and probably the Federal Constitution. **Ms. Holton** stated that having a criminal sanction and a civil license suspension process going at different times, in different courts, is unwieldy and unworkable. **Ms. Holton** explained there would be due process challenges to this bill, that the notice provision needs to be clarified, and the reinstatement fee needs to be included on the implied consent form.

**{Tape: 4; Side: A; Approx. Time Counter: 188 - 234}**

**Informational Testimony:** None

**Questions from Committee Members and Responses:**

**REP. GALLUS** asked the percent of DUI citations resulting in a plea of guilty or Nolo Contendere. **Ms. Bussey** responded she did not know the percentage but stated there is a drastic drop in convictions of people who refuse a BAC.

**{Tape: 4; Side: A; Approx. Time Counter: 235 - 264}**

**REPS. PARKER** and **NOENNIG** asked **Ms. Holton** about the double jeopardy problem. **Ms. Holton** based her statement that the bill violates double jeopardy, on U.S. Supreme Court cases dealing with civil and criminal penalties. She explained those cases hold that if a civil penalty is intended to be punitive, you may have double jeopardy problems. In a Montana Supreme Court case, State v. Danchek, the Court upheld a civil sanction based on the Court's determination the penalty was not punitive.

She emphasized that in this bill, it could not be argued that a criminal and civil sanction were not intended to be punitive. She believed the intent of the bill is punitive and thus would pose a violation of the double jeopardy clause.

***{Tape: 4; Side: A; Approx. Time Counter: 265 - 302}***

**Ms. Holton** stated the forfeiture of the driver's license is a civil penalty, and with the fine and/or imprisonment, it becomes a violation of double jeopardy. She stated if there was not a punitive sanction for the civil and criminal violations, it would not be a double jeopardy problem.

***{Tape: 4; Side: A; Approx. Time Counter: 303 - 333}***

**REP. NOENNIG** asked whether this bill would violate the Fifth Amendment. **Ms. Holton** responded there is certainly the potential. **REP. PARKER** questioned Ms. Holton about the court's holding that you can have a civil penalty, with a detrimental effect, if it is remedial in nature. **Ms. Holton** responded that was correct. **Ms. Holton** stated that this bill is clearly intended to be punitive and would not fall under the Danche ruling. She emphasized that because this bill would increase the fine, it has the express purpose of being punitive.

***{Tape: 4; Side: A; Approx. Time Counter: 334 - 393}***

**CHAIRMAN SHOCKLEY** asked whether drawing blood is a search under the Fourth Amendment or self incrimination under the Fifth Amendment. **Ms. Holton** responded it has been held to be a search under the Fourth Amendment in Schmirner v. California. She stated there is also a Fifth Amendment violation under the federal law. **Ms. Bussey** stated it is not a violation of the Fifth Amendment. **Brenda Nordlund, AG**, responded the issue was addressed in South Dakota v. Neville and she believed it is a Fourth Amendment issue.

***{Tape: 4; Side: A; Approx. Time Counter: 379 - 433}***

**REP. STOKER** asked Mr. Robinson, the ER physician, whether he had ever taken blood without consent on trauma patients. **Mr. Robinson** responded he had taken blood on trauma patients. He stated he was not privy to the prosecutions of those cases, but that blood is commonly drawn.

***{Tape: 4; Side: A; Approx. Time Counter: 434 - 455}***

**Closing by Sponsor:**

**REP. NEWMAN** closed on HB 289. He stated this bill needs to be amended by eliminating Sections 4-7. He emphasized it is the session to crack down on DUI's. He posed that leaving a side door, for drunk drivers to escape, would deflate the DUI laws. He stated this bill would crack down on drunk drivers that refuse the BAC.

***{Tape: 4; Side: A; Approx. Time Counter: 456 - 514}***

**ADJOURNMENT**

Adjournment: 12 P.M.

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REP. JIM SHOCKLEY, Chairman

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LISA SWANSON, Secretary

JS/LS

**EXHIBIT** (juh15aad)